THE UPPER TRIBUNAL
(ADMINISTRATIVE APPEALS CHAMBER)

UPPER TRIBUNAL CASE NO: GIA/0979/2011

Fish Legal
v
Information Commissioner
United Utilities plc
Yorkshire Water Services Ltd
and
the Secretary of State for the Environment, Food and Rural Affairs

UPPER TRIBUNAL CASE NO: GIA/0980/2011

Emily Shirley
v
Information Commissioner
Southern Water Services Ltd
and
the Secretary of State for the Environment, Food and Rural Affairs

[2015] UKUT 0052 (AAC)

DECISIONS ON APPEALS AGAINST DECISIONS OF A TRIBUNAL

CHAMBER PRESIDENT: CHARLES J
UPPER TRIBUNAL JUDGES: EDWARD JACOBS AND PAULA GRAY

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v

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TABLE OF CONTENTS

In electronic copies of this decision, CTRL-left click on any entry in this Table will jump to the relevant section.

DECISIONS OF THE UPPER TRIBUNAL (ADMINISTRATIVE APPEALS CHAMBER)

Fish Legal v Information Commissioner, United Utilities Water plc, Yorkshire Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs

As the decision of the First-tier Tribunal (made on 14 February 2011 under reference EA/2010/0069) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: United Utilities plc and Yorkshire Water Services Ltd are public authorities and their responses to Fish Legal's requests were late. No further steps are required of the companies.

Emily Shirley v Information Commissioner, Southern Water Services Ltd and the Secretary of State for the Environment, Food and Rural Affairs

As the decision of the First-tier Tribunal (made on 14 February 2011 under reference EA/2010/0076) involved the making of an error in point of law, it is SET ASIDE under section 12(2)(a) and (b)(ii) of the Tribunals, Courts and Enforcement Act 2007 and the decision is RE-MADE.

The decision is: Southern Water Services Ltd is a public authority and its response to Mrs Shirley's request was late. No further steps are required of the company.

REASONS FOR DECISION

1. These are our reasons for allowing these two appeals. We have given our short, formal reasons in the related judicial review proceedings under references *JR/5347/2014* (the Secretary of State's application) and *JR/5348/2014* (Fish Legal's application). Mrs Shirley reserved the right to apply for permission to being judicial review proceedings, but did not do so.

I PRELIMINARY MATTERS

A. Abbreviations

2. We use the following abbreviations:

Aarhus:	Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus on 25 June 1998
CJEU:	Court of Justice of the European Union and its predecessor the European Court of Justice
Commissioner	Information Commissioner
Companies:	United Utilities plc, Yorkshire Water Services Ltd and Southern Water Services Ltd, all of which are water and sewerage undertakers
EA:	Environment Agency
EID:	Directive 2003/4/EC on public access to environmental information
EIR:	Environmental Information Regulations 2004 (SI No 3391)
Foster:	the decision of the House of Lords in *Foster v British Gas plc* [1991] 2 AC 306, following the decision in CJEU Case C-188/89 [1991] 1 QB 405
FOIA:	Freedom of Information Act 2000
Guide:	Aarhus Convention Implementation Guide
Licence:	Instrument of Appointment as a water and/or sewage undertaker
OFWAT:	Water Services Regulation Authority
Smartsource:	the decision of the Upper Tribunal in *Smartsource Drainage and Water Reports Ltd v the Information Commissioner and a Group of 19 Water Companies* [2010] UKUT 415 (AAC)
Sugar:	the decision of the House of Lords in *British Broadcasting Corporation v Sugar* [2009] 1 WLR 430, also reported in the Court of Appeal at [2008] 1 WLR 2289 and in the High Court at [2007] 1 WLR 2583

TFEU: Treaty on the Functioning of the European Union

WIA: Water Industry Act 1991

B. The issues

3. These appeals raise two issues.

4. One issue is a matter of substance. It is whether the respondent companies are public authorities for the purposes of EIR. We call this the public authority issue.

5. The other issue is a matter of jurisdiction. It is whether the public authority issue is one that can be decided by the First-tier Tribunal or whether it has to be the subject of a judicial review. We call this the jurisdiction issue. It was raised late in the proceedings by the Secretary of State, but logically it has to be dealt with first.

6. To anticipate, we have decided that the public authority issue is within the jurisdiction of the First-tier Tribunal and that the companies are public authorities for the purposes of EIR by virtue of their special powers but not by virtue of being under State control.

C. The proceedings and their history

7. This is complicated.

8. Fish Legal is the legal arm of the Angling Trust. On 12 August 2009, it asked United Utilities Water plc and Yorkshire Water Services Ltd for information relating to discharges, clean-up operations, and emergency overflow. Mrs Shirley is a private individual. On 19 August 2009, she asked Southern Water Services Ltd for information relating to sewerage capacity for a planning proposal in her village. All three companies denied that they were under a duty to provide the information under EIR. Both Fish Legal and Mrs Shirley complained to the Commissioner. By letters dated 12 March 2010, the Commissioner replied, explaining that as the companies were not public authorities for the purposes of EIR, he had no power to adjudicate the complaints. The letters concluded:

> Nevertheless, should either party wish to pursue this matter further and, should the Information Tribunal be approached with a view to adjudicating on the matter, the Commissioner would not seek to take issue with the Tribunal's jurisdiction to consider whether a body is a public authority for EIR.

9. On appeal to the First-tier Tribunal, which had replaced the Information Tribunal, the tribunal dismissed the appeals, relying on the *Smartsource* decision, but gave permission to appeal to the Upper Tribunal.

10. In both cases the information requested was provided, so by the time the case came before Judge Jacobs in the Upper Tribunal the only issue was whether the information had been provided within the time allowed by regulation 5(2) of

EIR, which depended on whether the companies were public authorities. Judge Jacobs heard the cases together and, as they were in effect a challenge to the reasoning of the Upper Tribunal in *Smartsource*, he decided to refer the following questions to the CJEU under Article 267 of TFEU:

> *Article 2.2(b) of Directive 2003/4/EC*
>
> 1. In considering whether a natural or legal person is one 'performing public administrative functions under national law', is the applicable law and analysis purely a national one?
>
> 2. If it is not, what EU law criteria may or may not be used to determine whether:
>
> (i) the function in question is in substance a 'public administrative' one;
>
> (ii) national law has in substance vested such function in that person?
>
> *Article 2.2(c) of Directive 2003/4/EC*
>
> 3. What is meant by a person being 'under the control of' a body or person falling within Article 2.2(a) or (b)? In particular, what is the nature, form and degree of control required and what criteria may or may not be used to identify such control?
>
> 4. Is an 'emanation of the State' (under paragraph 20 of the judgment in *Foster v British Gas plc* (Case C-188/89)) necessarily a person caught by Article 2.2(c)?
>
> *Article 2.2(b) and (c)*
>
> 5. Where a person falls within either provision in respect of some of its functions, responsibilities or services, are its obligations to provide environmental information confined to the information relevant to those functions, responsibilities or services or do they extend to all environmental information held for any purpose?

The Court answered those questions under reference Case C-279/12. Its answers and the relevant passages of its judgment are in Appendix D.

11. It remained for the national court to apply the tests set out in the judgment. At this stage, the Secretary of State for the Environment, Food and Rural Affairs was joined as a party in order to make submissions on the general nature of the tests, which would have to be applied to a range of different bodies. The Secretary of State also argued, for the first time, that the First-tier Tribunal did not have jurisdiction over the issue whether a body was a public authority under FOIA and EIR, and that the proper route of challenge was by way of judicial review proceedings.

12. The Chamber President decided to appoint a three-judge panel to hear the appeals. Moreover, in order to avoid repetition of argument in other cases that were before the Upper Tribunal, the parties in those cases were invited to attend the hearing and to make any submissions they wished on the general nature of the test. Those cases are *GIA/0158/2012* (Duchy of Cornwall and HRH the

Prince of Wales v Information Commissioner and Mr Bruton) and *GI/2187/2013* (Miss Cross v Information Commissioner and the Royal Household).

13. At a directions hearing, it was agreed by all concerned that the correct route of challenge should not prevent the public authority issue being decided at this stage. Accordingly, the Secretary of State began judicial review proceedings in the Administrative Court challenging the decisions of the First-tier Tribunal and the Upper Tribunal, with all others involved joined as interested parties. The Chamber President, as a judge of the High Court, transferred those proceedings to the Upper Tribunal and assigned them to this panel. This is case *JR/5347/2014*.

14. Fish Legal also began judicial review proceedings in the Administrative Court challenging the decision of the Commissioner in its case, with all others involved joined as interested parties. Cobb J transferred those proceedings to the Upper Tribunal and they have been assigned to this panel. This is case *JR/5348/2014*.

15. Accordingly, on 24-27 November 2014, we heard the appeals in *Fish Legal* and *Shirley* along with the two transferred judicial review cases, with all parties involved attending and making submissions. As the *Cross* case has been transferred to the Upper Tribunal by the First-tier Tribunal, it will have to be heard by a panel containing a member. That is why Dr Henry Fitzhugh sat with us so that he would be familiar with all the arguments relevant to the issue he will have to decide in that case.

16. We are grateful to all counsel whose written and oral arguments we received:

Party	**Counsel**
Fish Legal	David Wolfe QC, instructed by William Rundle
Mrs Shirley	Robert McCracken QC with Meyric Lewis of counsel, both acting pro bono
Commissioner	Anya Proops of counsel
United Utilities plc Yorkshire Water Services Ltd Southern Water Services Ltd	Thomas de la Mare QC with Jacqueline Lean of counsel, both instructed by Osborne Clarke
Secretary of State	Julian Milford of counsel. James Eadie QC also contributed to the written argument and appeared at the directions hearing
Mr Bruton	Karen Steyn QC, who spoke on the public authority issue, with Joseph Barrett of counsel, who spoke on the jurisdiction issue, instructed by Harrison Grant

The Duchy of Cornwall Cabinet Office	Amy Rogers of counsel, instructed by Farrer and Co. Jonathan Crow QC also contributed to the written argument and appeared at the directions hearing

17. We also wish to thank Miss Cross, who despite not having any legal training made some pertinent points that had been missed by counsel.

II THE JURISDICTION ISSUE

A. Introduction

18. We have to deal with this issue. Jurisdiction is fundamental to the operation of a statutory tribunal, because it has no power to act outside its jurisdiction. A party is entitled to raise an issue of jurisdiction at any stage, as the Secretary of State did: *Carter v Ahsan* [2005] ICR 1817 at [82]. The parties cannot confer jurisdiction on a tribunal by consent, as the Commissioner purported to do in his letters of 12 March 2010: *Essex County Council v Essex Incorporated Congregational Church Union* [1963] AC 808 at 820-821 and 828.

B. The legislation

19. The relevant provisions of FOIA are set out in Appendix A. We are concerned with those provisions as modified by regulation 18 of EIR; they are set out in Appendix B. Our reasoning applies to both.

C. The arguments

20. In summary, the Secretary of State's argument was that: (i) pursuant to section 57 of FOIA the First-tier Tribunal only has jurisdiction over a decision notice issued by the Commissioner under section 50(3)(b); and (ii) the Commissioner had no jurisdiction to serve such a decision notice on the issue whether a body was a public authority. It is set out in more detail in paragraph 24. We call this the Secretary of State's argument, although the Commissioner adopted it. We accept (i), but we reject (ii).

21. The arguments against the Secretary of State's position were varied and included references to the access to justice provisions of Aarhus and EID. We do not find it necessary to refer to those provisions. Our reasoning, like that underlying the Secretary of State's argument, is based on statutory interpretation.

D. The First-tier Tribunal's jurisdiction

22. Section 57 of FOIA is clear. It provides that the complainant or the public authority may appeal to the First-tier Tribunal 'Where a decision notice has been

served'. For the purposes of this case, that means a decision notice under section 50(3)(b).

E. The Commissioner's jurisdiction

23. We follow the parties in referring to the Commissioner's jurisdiction. We would prefer to confine that word to judicial bodies and instead refer to the Commissioner's powers and duties, but that is merely a matter of terminology.

The argument

24. The Secretary of State's argument was based on the wording of the legislation. In outline, the argument was this. First, section 50(1) assumes the existence of a body that is a public authority for the purposes of FOIA. Second, that was a condition precedent to the making of an application under section 50. Third, only when it was satisfied did the Commissioner's power to serve a decision notice under section 50(3)(b) arise. Fourth, the Commissioner's power to make a decision under section 50(3)(a) was limited to the circumstances set out in section 50(2). Fifth, that subsection could not be used to give a decision that a body was or was not a public authority. Sixth, in any event there was clearly no right of appeal against a decision under section 50(3)(a). Seventh, the Commissioner had to decide whether a body was a public authority, but that decision could only be challenged by way of judicial review. Eighth, even if the Commissioner decided that a body was a public authority and went on to serve a decision notice under section 50(3)(b), the decision on the public authority issue could only be challenged on judicial review and would be outside the jurisdiction of the First-tier Tribunal. The Secretary of State cited the *Sugar* case in support, concentrating on passages from the speeches of the minority, and in particular that of Lord Hoffmann who concluded (i) that the question whether the request had been made to a public authority was anterior to the jurisdiction of the Commissioner and (ii) that FOIA did not give him jurisdiction to decide it. We analyse *Sugar* in detail at paragraphs 43 to 55.

Why we reject the Secretary of State's argument

25. We begin by considering how the legislation operates in a straightforward case. Assume that a person has requested information from a local authority, is met with the response that the information is not held, and applies to the Commissioner for a decision under section 50. There is no dispute that the person, referred to in section 50 as the complainant, made a request for information from a public authority. The choices open to the Commissioner on that application are set out in mandatory terms. If it appears to the Commissioner that section 50(2) applies, he has to notify the complainant under section 50(3)(a) that he is not making a decision. If the complainant is dissatisfied with that response, the remedy lies in judicial review. If the Commissioner does not rely on section 50(2), section 50(3)(b) imposes a duty to serve a decision notice. This obliges the Commissioner to come to a decision on

whether the request was dealt with in accordance with the requirements of Part I of FOIA. If the complainant is dissatisfied with the decision notice, the remedy lies on appeal under section 57.

26. The same applies in more complicated cases. Assume that a person has requested information from a local authority, is met with the response that the request is vexatious, and applies to the Commissioner for a decision under section 50. Vexatious requests are governed by section 14(1):

> (1) Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious.

The way that section operates is to relieve the local authority of the duty that would otherwise apply under section 1(1). The request does not cease to be a request just because it is vexatious. Accordingly, when the Commissioner considers the request under section 50, there will be no dispute that the person made a request for information from a public authority. Unless the Commissioner relies on section 50(2) – for example on the ground that the application (as opposed to the request) was vexatious - section 50(3)(b) imposes a duty to serve a decision notice. This obliges the Commissioner to come to a decision on whether the request was dealt with in accordance with the requirements of Part I of FOIA. Assuming the Commissioner agrees that the request was vexatious, the decision notice will say that the local authority was not under a duty under section 1(1) and had acted in accordance with the requirements of Part I. If the complainant is dissatisfied with the decision notice, the remedy lies on appeal under section 57.

27. On the Secretary of State's argument, the position is different if the proper classification of the body from which information was requested is in issue. Although that is how the argument was presented, it is important to appreciate the argument cannot be so limited. If it is correct, the Commissioner has no jurisdiction to consider an application under section 50(1) and so to serve a decision notice under section 50(3)(b) on the issue whether the body was a public authority. And if that is right, it must apply to all the elements on which section 50(1) is predicated. That means that it must apply to all these issues:

- whether there was a request;
- whether that request related to information;
- whether the person making the request and the complainant were the same person; and
- whether the body from whom the information was sought was a public authority.

The reasoning also applies to section 51: see our discussion in paragraph 41 below.

28. This raises the question: what is it that makes the proper classification of the body and the other issues mentioned in paragraph 27 different from, say, the issue whether the information is held or the request is vexatious? The Secretary of State's argument at the hearing relied (i) on the structure and language of the

legislation and (ii) on *Sugar*. We reject his argument on (i) for the following reasons.

29. First, the Secretary of State accepts that the Commissioner has to come to a conclusion on the proper classification of a body, but inevitably does not identify the legislative basis on which the Commissioner would have either a power or a duty to make a decision on that issue. This leaves the Commissioner's position in relation to the fundamental concepts on which the legislation is based and which form the conditions precedent to his jurisdiction to be dealt with only outside the express statutory structure of sections 50 and 57. If that is the correct reading of the legislation, it would be, in our view, surprising.

30. Second, the argument overlooks the way in which legislation is regularly drafted. Legislation is often based on concepts, which are then assumed to exist for the purposes of jurisdictional provisions. So an appeal 'from any decision of an appeal tribunal ... on the ground that the decision of the tribunal was erroneous in point of law' appears to require as conditions precedent both that a decision has been made and that it was made by a body that would constitute a tribunal. Nevertheless, there would be an error in point of law if the 'tribunal' were not properly constituted as a tribunal: *Gillies v Secretary of State for Work and Pensions* [2006] 1 WLR 781 at [6]. Likewise, on an appeal against 'any decision of the Secretary of State', a tribunal would be entitled to decide that 'the decisions under appeal have so little coherence or connection to legal powers that they do not amount to decisions at all': *R(IB) 2/04* at [72].

31. Take as an example our basic jurisdiction under section 11 of the Tribunals, Courts and Enforcement Act 2007. This provides for 'a right to appeal to the Upper Tribunal on any point of law arising from a decision made by the First-tier Tribunal'. That assumes both that there is a decision and that it was made by the First-tier Tribunal. That does not deprive the Upper Tribunal of jurisdiction over either of those issues on an appeal. Applying *Gillies* and *R(IB) 2/04*, in effect the section provides for a right of appeal to the Upper Tribunal on any point of law arising from *what purports to be* a decision made by *a body holding itself out as properly constituted to be* the First-tier Tribunal.

32. Those authorities deal with the right to challenge decisions before a judicial body. We can see no reason why the principle of interpretation is not equally applicable to an administrative decision-maker such as the Commissioner. FOIA is based on three key concepts: (i) a request (ii) for information (iii) held by a public authority. When in sections 50 and 51 the legislation refers to public authorities as it does, it is merely a convenient way of referring back to a request made under section 1 that is the trigger to the application of FOIA.

33. Third, the Secretary of State's argument is based on a flawed analysis of the validity of administrative decisions and leads to anomalies. On the argument:

- If the Commissioner decides that a body is not a public authority – call this a negative decision - there is no power to issue a decision notice under section 50(3)(b).

- If the Commissioner decides that a body is a public authority – call this a positive decision – the Commissioner is under a duty to issue a decision notice under section 50(3)(b).

The Secretary of State argued that judicial review was the appropriate way to challenge both a negative decision that the body was not a public authority and a positive decision that it was, despite the fact that a positive decision would be embodied in a document called a decision notice.

34. The argument was based on the assertion that the question whether the request had been made to a public authority was a condition precedent to, or anterior to, the jurisdiction of the Commissioner, with the result that it could not be determined by him in performing his duties under FOIA and, therefore, in making the decisions he is required to make by section 50.

35. This cannot be correct in respect of a positive decision. It assumes that the conditions set out in section 50 must be satisfied before the Commissioner can exercise his jurisdiction over an application under that section. That is not the correct analysis. As the Privy Council decided in *Calvin v Carr* [1980] AC 574 at 590:

> ... where the question is whether an appeal lies, the impugned decision cannot be considered as totally void, in the sense of being legally non-existent. So to hold would be wholly unreal. The decision of the stewards resulted in disqualification, an effect with immediate and serious consequences for the plaintiff. ... An analogous situation in the law exists with regard to criminal proceedings. In *Crane v Director of Public Prosecutions* [1921] 2 AC 299 there were irregularities at the trial which had the effect that the trial was 'a nullity,' Nevertheless an appeal was held to lie to the Court of Criminal Appeal. ...
>
> ...
>
> Passing from this analogy to authorities directly relevant in the field of civil proceedings their Lordships consider that these support the proposition that a decision of an administrative or domestic tribunal, reached in breach of natural justice, though it may be called indeed may be, for certain purposes 'void' is nevertheless susceptible of an appeal. ...

In other words, what is or purports to be a decision that is the subject of an appeal and has consequences that remain in existence until they are challenged has sufficient validity to be the subject of that appeal. Applying this approach to a positive decision produces this result. The Commissioner would have served what he considers to be a decision notice under section 50(3)(b) and that notice would have consequences that give it sufficient existence in law to allow an appeal. This accords with the view expressed by Baroness Hale one of the minority in *Sugar* at [67]. In written submissions provided at our request after the hearing, the Secretary of State unsurprisingly accepted that on an appeal to it the First-tier Tribunal can decide the limits of its jurisdiction and helpfully referred to a number of cases that establish that proposition starting with

Bunbury v Fuller (1853) 9 Ex 111. So the Secretary of State accepted that the First-tier Tribunal (and the Upper Tribunal on a voluntary transfer) can decide whether a notice given under section 50(3)(b) has sufficient effect to found an appeal. This engages an assessment of whether the Commissioner was right to make a positive decision and so to serve such a notice.

36. A negative decision may not be framed as a decision notice under section 50(3)(b), but its effect is to dismiss a complainant's application for a decision by the Commissioner on whether a request he made has been dealt with in accordance with Part 1 of FOIA and so unless and until it is challenged it has that consequence.

37. The Secretary of State's position that a negative decision is not a decision under section 50(3)(b) and so can only be challenged by judicial review produces the anomaly that the same issue would be challenged differently according to whether it was decided positively or negatively. That in turn would produce a further anomaly. A negative decision would have to be challenged by the person making the request and that would go by way of judicial review to the Administrative Court, while a positive decision would have to be challenged by the body and that would go to the First-tier Tribunal. So the individual requester would have to take the more complicated and potentially expensive procedure, while the body would have the easier and potentially cheaper procedure before the tribunal. If the body were to apply for a judicial review, it could be met by the answer that there was an alternative remedy available, by way of appeal, although Baroness Hale took a different view in *Sugar* at [67].

38. We have not overlooked the possibility of the Administrative Court transferring the judicial review proceedings to the Upper Tribunal under section 31A of the Senior Courts Act 1981. That would merely add to the complexity of the proceedings for an individual requester, thereby reinforcing our argument. Nor have we overlooked that judicial review is the only remedy available if the Commissioner decides that one of the heads in section 50(2) applies. He is then prevented by section 50(3)(a) from giving a decision notice, which is a condition precedent to an appeal under section 57. The availability of a remedy does not mean that it will be exercised. So, since heads (a) and (d) in section 50(2) are unlikely to be contentious, they will not generate a challenge. Heads (b) and (c) might be more contentious, but it is a rational legislative policy to leave these matters to the jurisdiction of judicial review, which is discretionary, and exclude them from the jurisdiction of the Commissioner and the First-tier Tribunal, which is as of right.

39. These anomalies and problems would be avoided if a negative decision was also a decision within section 50(3)(b). Although they cannot found that result on a literal interpretation, they can and do provide support for the view that such a conclusion would accord with the underlying intention of FOIA. In our view, the mandatory requirements of section 50 found the view that any decision on an application made to the Commissioner that is not based on section 50(2) is a decision on that application within section 50(3)(b). So, in our view, a negative decision is a decision within section 50(3)(b) that, like a positive decision, has

consequences that give it sufficient existence in law and validity to allow an appeal.

40. Fourth, the Secretary of State's interpretation is capable of generating a multiplicity of proceedings on relatively minor issues. An example of a recent case that came before this Chamber serves as an example of the extent of the Secretary of State's reasoning. There was, in that case, no doubt that the body in question was a public authority. The complainant had sent a series of emails and letters to the authority, which had replied in various terms on each occasion. He complained to the Commissioner that the authority had responded outside the time allowed by section 10. Whether that argument was correct depended on which of the emails and letters amounted to requests and on the scope of each request. If the Secretary of State is correct, the classification of the correspondence should have been brought before the Administrative Court in judicial review proceedings before the First-tier Tribunal could decide whether the authority had replied in time. We are not just making a point that minor matters would potentially come before the Administrative Court; that is also the case for the matters listed in section 50(2), which we have dealt with in paragraph 37 above. Rather, the point is that the resolution of what on its face seems a straightforward composite issue would require multiplicity of proceedings. This is a convenient point to deal with Ms Proops' argument that jurisdiction is never a minor matter. That is correct, but it is relevant to take account of the practical importance of an issue in deciding whether, as a matter of interpretation, it is an issue of jurisdiction.

41. Fifth, the argument can have the effect of preventing the Commissioner from making an informed decision that could be subject to judicial review. If the Secretary of State's reasoning is correct on section 50, it is equally applicable to the structure and language of section 51, which confers power on the Commissioner to require a body to provide information. Section 51 is the only source of the Commissioner's power to obtain the information he requires from a reluctant body. If the argument is correct, the Commissioner has to come to a conclusion on whether the body is a public authority, but has no power to obtain information that is necessary to decide that issue. As Lord Phillips noted of the jurisdictional issue in *Sugar* (see paragraphs 43 to 54 below) at [20]:

> In a case such as this, that issue turns on whether the information held is public or excluded information. If the commissioner's jurisdiction turns on precisely the same question, how is he to set about resolving it if, as is likely to be the case, he lacks the necessary information? Section 51 is designed to enable him to require the production of information that he needs to perform his duties, but that section will not apply if the commissioner has no jurisdiction.

42. For those reasons, individually and collectively, the interpretation proposed by the Secretary of State is not one that we think Parliament can have intended and we would not attribute it to Parliament, unless there were authority that required us to do so. This brings us to the *Sugar* case.

Sugar

43. The Secretary of State relied on the decision of the House of Lords in this case. It is, with respect, not an easy case to analyse. It was decided by a majority consisting of Lords Phillips, Hope and Neuberger, but each gave their own reasons; and all the judges, including Lord Hoffmann and Baroness Hale who dissented, made comments relevant to the jurisdictional issue.

44. The best place to start is with the decision and, in order to understand that, it is necessary to set out the history of the proceedings. Mr Sugar asked the BBC for a copy of the Balen Report on its reporting of Middle Eastern affairs. The BBC was listed as a public authority under FOIA, but only in respect of information held for purposes other than journalism, art and literature. It refused to provide a copy of the report, saying that it held it for the purposes of journalism (the journalism issue). Mr Sugar complained to the Commissioner, who agreed with the BBC and so made, in our terminology, a negative decision. Mr Sugar then lodged an appeal with the Information Tribunal, which has now been replaced by the First-tier Tribunal. It decided that it had jurisdiction. The BBC appealed against that decision to the High Court. It also sought judicial review of the tribunal's decision. Mr Sugar in turn sought judicial review of the Commissioner's decision. At first instance, Davis J decided that the Commissioner had determined on the journalism issue that the BBC was not a public authority with the results that (a) section 1 of FOIA had no application and he had no jurisdiction, and (b) the Commissioner had made no decision that was susceptible to an appeal to the tribunal under FOIA: [2007] 1 WLR 2583. The Court of Appeal dismissed Mr Sugar's appeal against Davis J's decision that the tribunal had no jurisdiction: [2008] 1 WLR 2289. The House of Lords allowed Mr Sugar's further appeal, remitting the case to Davis J: [2009] 1 WLR 430. So, in the result, the House accepted that the Commissioner had jurisdiction, thereby giving the tribunal jurisdiction. The issue in that case was different from that before us, but the outcome of the case is consistent with our analysis.

45. We now take the speeches in the order they were delivered.

46. Lord Phillips identified two issues: (i) whether the Commissioner was correct to conclude that he had jurisdiction under FOIA and (ii) whether the Commissioner had made a decision that was susceptible to an appeal to the tribunal. On (i), he considered at [25] that the seminal question was whether Mr Sugar had made a request of a public authority under section 1 and concluded on alternative approaches that he had. The first of those approaches was that he made the request of the BBC in its capacity as a public authority(at [26]); the second was that a 'public authority' embraced a hybrid authority (at [28]). He concluded at [31] that whichever approach to the construction of 'public authority' was correct:

> the request for information made by Mr Sugar to the BBC was made to a public authority and section 1 of the Act applied to it. What was the BBC's obligation on receipt of the request? That depends upon the answer to the journalism issue. If Mr Sugar is correct on this issue, the BBC was under an

> obligation under section 1(1)(b) to communicate the Balen Report to him. What if the BBC is correct, and the Balen Report was excluded information?

Accordingly he concluded that the Commissioner had been wrong to conclude that he had no jurisdiction under FOIA and that, as Mr Sugar had made a request under section 1, the journalism issue and thus the determinative issue on whether the BBC was a public authority fell to be decided in determining whether that request had been dealt with by the BBC in accordance with Part 1 of FOIA. On (ii), he concluded at [37] that the tribunal had been correct to conclude that the substance of the Commissioner's (in our terms, negative) decision on the public authority question in that case was a decision under section 50 that Mr Sugar was entitled to challenge before the tribunal on appeal. So his speech favours our conclusion that a negative (and necessarily a positive) decision by the Commissioner on the public authority issue is a decision within section 50(3)(b).

47. Lord Hoffmann dissented. He said at [42] that 'Everyone agrees that section 50 does not allow the commissioner to confer jurisdiction on himself by a finding that a body is a public authority ... It is either a public body or it is not. If that question is disputed, it must be decided by a court.' The first part of that quotation is, with respect, obviously correct. On our analysis, the Commissioner's decision is subject to control by the First-tier Tribunal and the Upper Tribunal on appeal, just as on the Secretary of State's analysis it would be subject to control by the Administrative Court on judicial review. The second part of that quotation was picked up by Lord Hope, but there is nothing in the report to show what argument, if any, the House heard on this point.

48. At [46] to [48], Lord Hoffmann disagreed with the alternative analyses of Lord Phillips on his issue (i) and concluded that the public authority issue is anterior to the jurisdiction of the Commissioner; and he agreed with the conclusions of Davis J and the Court of Appeal [49] and [50]. This minority speech supports the argument of the Secretary of State and its reasoning applies to both a positive and a negative decision.

49. Lord Hope accepted that the appeal could be allowed on the grounds identified by Lord Phillip and Lord Neuberger, but preferred (at [58]) to base his agreement primarily on the fact that the BBC was a public authority as it was listed in FOIA, which mirrors Lord Phillips' approach at [28]. He agreed at [52] (and at [57]) with Lord Hoffmann that a challenge to the proper classification of a body 'must be decided by a court. But this assumes that the question whether the body is or is not a public authority is genuinely open to dispute.' With respect this seems to avoid the issue whether the decision made by the Commissioner was within section 50(3)(b) and so founded an appeal to the tribunal as it goes straight to the substantive result on the public authority issue. But his agreement in the majority result means that he accepted that the Commissioner's decision was an appealable decision under section 50 for the reasons given by Lords Phillips and Neuberger.

50. Baroness Hale says plainly at [60] that the Commissioner 'does not have power to issue a formal decision if he concludes ... that the person or body to whom the request for information was made is not a public authority within the meaning of the Act ...' However, she noted at [67] that 'if the commissioner concludes that the body, person or office holder concerned is a public authority, then ... there will be a decision within the meaning of section 50(1) which can be appealed to the tribunal. It would also be susceptible to judicial review on the ground that the Commissioner had exceeded his jurisdiction.' She went on (at [68]) to note the comparative advantages of proceedings in the tribunal over those in the Administrative Court. At [69], she identified the question as being whether the statutory language applied to the document in question (i.e. the negative decision in that case) and concluded that it did not. Accordingly, her speech provides support for the Secretary of State's argument on a negative decision but support for our conclusion on a positive decision.

51. Lord Neuberger gave his own reasons, although he also agreed with the reasons of Lord Phillips and Lord Hope: see [96]. He said at [84] that:

> A court, acting under the judicial review procedure, would be a significantly less appropriate forum for such a determination [whether information was or was not excluded] than the tribunal and the commissioner, with all their accumulated expertise, their statutory powers to order disclosure, and their inquiries being essentially confidential in nature.

The core of his reasoning is founded on the overall purpose of FOIA at [89], [90] and [91]. He said:

> 90. ... The applicant has treated it as a public authority by making a request under section 1 of the Act, and, at least until he accepts, or it is conclusively determined, that the information he seeks is excluded, it appears not only sensible, but not in conflict with those provisions, that the authority should be treated as a public authority subject to the provisions of the Act.
>
> 91. Once a hybrid authority honestly concludes that the requested information is excluded, then it would appear to follow that it should also be able to contend that it need not comply with the obligations in section 1. That seems to me to be consistent with the policy of the Act: a hybrid authority should not have to search for and give details of, information which it honestly believes is excluded, unless and until it is held not to be excluded. However, just as the authority can proceed on the basis that it is right in such a case, so can the applicant proceed on the basis that he is right. Accordingly, if the applicant considers that the information is not excluded, he can apply to the commissioner for a decision under section 50. That is because he contends that he has made 'a request for information ... to a public authority' which has not 'been dealt with in accordance with the requirements of Part I'. The commissioner can then proceed to deal with the application under sections 50 to 53, and if either party is dissatisfied with his decision, they can appeal to the tribunal under section 57.

52. This approach overlaps with the reasoning of Lord Phillips based on his first approach that the request was made to a body as a public authority and his conclusion at [37]. So both Lord Phillips and Lord Neuberger reason that because, on an application to the Commissioner, the complainant contends that he has made 'a request for information ... to a public authority' which has not 'been dealt with in accordance with Part 1', the Commissioner can proceed to deal with that application under sections 50 to 53 and if either party is dissatisfied with is decision, they have the right to appeal under section 57. This must mean that, like Lord Phillips, Lord Neuberger was of the view that a negative decision on the public authority issue was a decision under section 50(3)(b). Accordingly, his speech provides support for our conclusions on a negative (and necessarily a positive) decision.

53. Our conclusions on *Sugar* are that the support given to Lord Hoffmann by Lord Hope and Baroness Hale does not mean that the reasoning in the speeches read together provides authority in favour of the Secretary of State's argument. Rather, the decision of the majority that the negative decision in that case was a decision made under section 50 supports the view we have come to. We acknowledge that parts of the reasoning relate to the position of the BBC as a hybrid authority, but we consider that the reasoning read as a whole provides support for our conclusion that a positive and a negative decision on whether the request has been made to a public authority is a decision within section 50(3)(b), because (i) the person making the request has made it on the basis that it is directed to a public authority (and so is founded on one of FOIA's key concepts), (ii) the complainant's application under section 50 empowers the Commissioner to consider that public authority issue on that application, and (iii) his decision on that point is one that both parties can challenge on appeal under section 57 as it is the decision or part of the decision on that application.

54. So, to revert to our provisional position set out in paragraph 42 above, there is nothing in *Sugar* that compels us to a different conclusion from our analysis of the legislation. Indeed, it supports it.

Conclusion

55. In summary, the Commissioner has jurisdiction both to investigate and decide whether a body is a public authority. That decision is one made on the application under section 50 of FOIA and so the document giving notice of that decision is a decision notice served under section 50(3)(b). Sections 50 and 51 are predicated upon the existence of the three key concepts of request, information and public authority on which the legislation is based. But that does not deprive the First-tier Tribunal of jurisdiction to deal with those issues. As Mr Barrett put it at the hearing, section 50(1) merely describes the matters that may be the subject of an application under that section and so a complaint about the way the specific request has been dealt with; it does not prescribe conditions that must be met before an application can be made and determined by the Commissioner. When that section and section 51 refer to an application, they refer to a complaint to the Commissioner that any requirement of the legislation has not

been met and the Commissioner can address all the reasons advanced as to why this has not occurred, including the assertion that FOIA does not apply because the request was not made to a public authority.

III THE PUBLIC AUTHORITY ISSUE

A. The protection of the environment in the EU

56. The protection of the environment is part of the constitution of the EU. Article 191 of TFEU provides:

> TITLE XX
>
> **ENVIRONMENT**
>
> *Article 191*
>
> (ex Article 174 TEC)
>
> 1. Union policy on the environment shall contribute to pursuit of the following objectives:
>
> - preserving, protecting and improving the quality of the environment,
> - protecting human health,
> - prudent and rational utilisation of natural resources,
> - promoting measures at international level to deal with regional or worldwide environmental problems, and in particular combating climate change.
>
> 2. Union policy on the environment shall aim at a high level of protection taking into account the diversity of situations in the various regions of the Union. It shall be based on the precautionary principle and on the principles that preventive action should be taken, that environmental damage should as a priority be rectified at source and that the polluter should pay.
>
> In this context, harmonisation measures answering environmental protection requirements shall include, where appropriate, a safeguard clause allowing Member States to take provisional measures, for non-economic environmental reasons, subject to a procedure of inspection by the Union.
>
> 3. In preparing its policy on the environment, the Union shall take account of:
>
> - available scientific and technical data,
> - environmental conditions in the various regions of the Union,
> - the potential benefits and costs of action or lack of action,
> - the economic and social development of the Union as a whole and the balanced development of its regions.
>
> 4. Within their respective spheres of competence, the Union and the Member States shall cooperate with third countries and with the competent international organisations. The arrangements for Union cooperation may

> be the subject of agreements between the Union and the third parties concerned.
>
> The previous subparagraph shall be without prejudice to Member States' competence to negotiate in international bodies and to conclude international agreements.

Consistently with this, the EU is party to Aarhus and has implemented its provisions in EID.

57. The Guide explains something of the innovative nature of Aarhus in its Introduction under the heading **A new kind of environmental convention**:

> The Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters (Aarhus Convention) was adopted at the Fourth Ministerial Conference 'Environment for Europe' in Aarhus, Denmark, on 25 June 1998. Thirty-nine countries and the European Community have since signed it.
>
> The Aarhus Convention is a new kind of environmental agreement. It links environmental rights and human rights. It acknowledges that we owe an obligation to future generations. It establishes that sustainable development can be achieved only through the involvement of all stakeholders. It links government accountability and environmental protection. It focuses on interactions between the public and public authorities in a democratic context and it is forging a new process for public participation in the negotiation and implementation of international agreements.
>
> The subject of the Aarhus Convention goes to the heart of the relationship between people and governments. The Convention is not only an environmental agreement, it is also a Convention about government accountability, transparency, and responsiveness.
>
> The Aarhus Convention grants the public rights and imposes on Parties and public authorities obligations regarding access to information and public participation. It backs up these rights with access-to-justice provisions that go some way towards putting teeth into the Convention. In fact, the preamble immediately links environmental protection to human rights norms and raises environmental rights to the level of other human rights.
>
> Whereas most multilateral environmental agreements cover obligations that Parties have to each other, the Aarhus Convention covers obligations that Parties have to the public. It goes further than any other convention in imposing clear obligations on Parties and public authorities towards the public as far as access to information, public participation and access to justice are concerned.

B. The legal structure of the water industry

58. We base what follows on Judge Jacobs' reference to the CJEU, which was written with the help of the representatives of Fish Legal, Mrs Shirley and the companies. The Secretary of State was not then a party to the proceedings.

Background

59. It is not necessary to begin sooner than the middle of the 20th century, when the majority of water and sewerage services were in public ownership with provision by local government authorities (often acting cooperatively through 'Joint Boards') under the Public Health Act 1936.

60. The Water Act 1973 transferred, in general, responsibility for these services to regional water authorities. Some services were provided by statutory companies acting on their behalf.

61. The Water Act 1989 privatised the water industry in England and Wales with effect from 1 September 1989, introducing largely the structure which applies today. At privatisation the functions, powers, property and other assets of the regional water authorities were divided between the National Rivers Authority (now, after the Environment Act 1995, the EA) and the new privatised companies, which were in future to provide water and sewerage services. The Authority became the principal water quality regulator, and received the water authorities' environmental regulatory functions, including the management and licensing of water resources and pollution control and prevention. The companies received *inter alia* the networks of pipes and reservoirs, sewers and sewage treatment works which formed the relevant physical systems. Shares in the companies were then made available on the open market in a public offering.

62. The water authorities in Scotland and Northern Ireland remain in public ownership, answerable to central (Northern Ireland) or devolved (Scotland) government and with directors appointed by the relevant government. The Scottish and Northern Irish water authorities are not regulated by OFWAT.

WIA

63. The legislation governing water management in England and Wales was consolidated and amended in 1991. WIA is, for the purposes of these appeals, the principal Act that now provides the statutory framework for the water industry. It is split into eight parts, each addressing different aspects of the organization of water and sewerage services.

- Part I establishes OFWAT with primary responsibility for supervising water and sewerage undertakers, replacing the Director General for Water Services. It is described on its website as 'a non-ministerial government department... independent of government and the [companies], although ... directly accountable to Parliament ...'
- Part II provides for the appointment and supervision of water and sewerage undertakers. Appointment on appropriate conditions is a function

undertaken solely by the Secretary of State, but with supervision often jointly undertaken by the Secretary of State and OFWAT.

- Part III provides the framework for the supply of water by water undertakers and licensed suppliers, including the rights and duties of water undertakers.
- Part IV provides the framework for the provision of sewerage services by sewerage undertakers.
- Part V contains the financial provisions. Specifically, it addresses the charges that can be made by water and sewerage undertakers for their services.
- Part VI relates to powers and works, and to the statutory protection enjoyed by water and sewerage undertakers' works and apparatus. It sets out the statutory powers available to water or sewerage undertakers.
- Part VII contains the 'information provisions' applying, variously, to OFWAT, water and sewerage undertakers and others.
- Part VIII contains miscellaneous provisions.

64. Only companies appointed by the Secretary of State or (now) OFWAT as the water supply and/or sewerage undertaker for an area of England and Wales may provide these services.

The companies' corporate structure and governance

65. The companies have been appointed as water and sewerage undertakers in their respective areas. They were, following privatisation, set up as limited liability companies (with shares either held privately or listed on a stock exchange). Only a limited company may be appointed as a water or sewerage undertaker. The companies are run by boards of directors, responsible to the companies' shareholders. They operate on normal commercial principles, as set out in their memoranda and articles of association, with the aim of generating profits for distribution to shareholders as dividends and to allow reinvestment in the business.

66. The companies are subject to the rules that bind all other public limited companies or limited companies (Licence condition F6A.5A), including compliance with the Combined Code on Corporate Governance contained within the Listing Rules of the Financial Services Authority.

67. The companies receive no public subsidy, whether in the form of capital or income. Neither borrowing nor investment decisions are directly dictated by government or any other public body. Nor is any of the companies' borrowing backed by the State. Accordingly, each company's funds derive from these sources:

- charges to customers;
- sale of shares and other rights issues;
- borrowing through the capital markets at normal commercial rates (either through direct loans or the issue of corporate bonds); and
- other commercial activities such as sale of land and other assets.

68. Each company has a Licence running from 1 September 1989, which contains the terms of the appointment of each company as a water and/or sewerage undertaker. It not only imposes the general statutory duties and grants the general statutory powers but also includes other conditions. These may include the payment of sums of money to the Secretary of State. Some of the important conditions are summarized in the judgment of Blackburne J in *Griffin v South West Water Services* Ltd [1995] IRLR 15 at paragraphs 95-112.

69. The Licence can be terminated only on 25 years' notice (Licence condition O as amended), with reasons. The Licence may only be modified by OFWAT (i) with the relevant company's consent, or (ii), without consent, after a Competition Commission report. It may be amended to replace an outgoing company with a new one under what are known as 'inset appointments'.

70. Compliance with the terms of the Licence is enforced by the Secretary of State or OFWAT, who may require that an undertaker carries out specific actions or measures. Part II Chapter III now also provides for financial penalties. Part II also restricts the operation of the ordinary provisions for the dissolution of the companies.

Functions of OFWAT

71. The companies are effectively monopoly suppliers to most users of their services in their areas of appointment. Therefore, the regulatory system seeks to scrutinise such monopoly prices through what is widely called (by OFWAT and industry operators) 'comparative competition', that is a system under which the prices of the companies are benchmarked against each other to assess how each company's performance compares with that of the most efficient companies. This occurs during the five yearly price reviews. On the basis of this assessment, the maximum which each company can charge customers and the means by which their charges are levied is determined by OFWAT for five year periods. The current one is the fifth such period and covers 2010 to 2015.

72. Every five years the companies submit draft asset management plans (also known as 'business plans') which set out details of their desired outputs such as capital investment programmes. The plan must be one which, according to the OFWAT website, 'optimises and exposes the costs and benefits of the plan at the overall and component level'. OFWAT provisionally determines which elements of the plans are in its view appropriate and produces drafts of what it will approve for the relevant period. After consultation, the companies submit final business plans and OFWAT determines the maximum charges that may be levied on the basis of its final judgement on matters such as the appropriate capital investment programme. This final determination sets the maximum that the companies may charge their customers to finance the desired outputs contained in their business plans. The companies are at liberty to seek to achieve additional outputs. However, these would have to be self-funded as the companies are not permitted to charge more than the maximum set by OFWAT.

73. OFWAT is required to exercise its regulatory functions so as to ensure that the companies are able (in particular, by ensuring reasonable returns on their capital) to finance the proper carrying out of their functions as water and sewerage undertakers. This requires that OFWAT assesses whether the companies' return on capital is reasonable and whether they have sufficient commercial freedom to be able to access, in the marketplace, sufficient finance (in terms of quantity and price) to carry out their functions.

Duties of Water and Sewage Undertakers

74. Water undertakers have duties under WIA:

- 'to develop and maintain an efficient and economical system of water supply within its area, and to ensure that that all such arrangements have been made -

    (i) for providing supplies of water to premises in that area and for making such supplies available to persons who demand them; and

    (ii) for maintaining, improving and extending the water undertaker's water mains and other pipes,

  as are necessary for securing that the undertaker is and continues to be able to meet its obligations under this Part' (section 37(1));
- in addition, the legislation imposes a range of duties in relation to the provision and maintenance of the water supply and the water supply system.
- The ability of these undertakers to disconnect customers from the water supply is limited and subject to strict procedural requirements breach of which is a criminal offence.
- The Water Act 2003 imposed a duty to produce Water Resource Management Plans and Drought Plans. The former are documents providing details, over a 25 year forward period, of the undertakers' plans for managing and developing its water resources, so as to enable it to continue to meet its supply and other obligations under WIA.

75. Sewerage undertakers have duties under WIA:

- '(a) to provide, improve and extend such a system of public sewers (whether inside its area or elsewhere) and so to cleanse and maintain those sewers... as to ensure that that area is and continues to be effectually drained; and

  (b) to make provision for the emptying of those sewers and such further provision (whether inside its area or elsewhere) as is necessary from time to time for effectually dealing, by means of sewage disposal works or otherwise, with the contents of those sewers' (section 94(1));
- to attain certain standards of performance in accordance with regulations: see the Water Supply and Sewerage Services (Customer Service Standards) Regulations 2008 (as amended). These include regulations in relation to the flooding of third party land. There are related obligations under WIA to

furnish both the OFWAT and customers with information about levels of performance;

- to provide sewers in certain locations where there are, or are likely to be, adverse effects on the environment or amenity if a public sewer is not provided; and
- to accept communication with its public sewers from the drains and private sewers of premises, although this duty is qualified and subject to the companies recovering their costs of allowing any connection from those wishing to connect. All sewerage services delivered to the customer through that communication are then charged for by the sewerage undertaker in the usual way.

Powers of Water and Sewage Undertakers

76. Water and sewerage undertakers are given by statute a range of powers, some of them shared with others. They are the powers that were the subject of discussion before us and they were given to them by Parliament to enable and assist them to perform their duties. They include these powers:

- Compulsory purchase of land, and rights in and over land (including by the creation of new rights) (sections 155, 168 and 171);
- Byelaw making over waterways (and land held with them) in their ownership (section 157 and Schedule 10) for the purposes of preserving order and preventing damage on, or undue interference with, that land (section 157 and Schedule 10);
- Placing, altering and maintaining pipes in both streets and other land (sections 158 and 159);
- Discharging water (subject to certain reasonable restrictions) into any available watercourses, including those owned by others where such discharge might normally constitute a trespass, wherever exercising the powers specified (section 165);
- (In the case of water undertakers) to impose temporary hosepipe bans restricting usage of the water supply by the public (section 76), and either to cut off supply to premises or serve a notice requiring a person to take steps to ensure suspected damage, contamination, waste, misuse or undue consumption that might be caused to an undertaker's property and/or the water supply ceases or does not occur (section 76); and
- Entry over third party land for purposes related to the carrying out of works (section 168, subject potentially to the payment of compensation under Schedule 6 Part II paragraph 11) and for sewerage purposes (section 171, in respect of which no compensation is available under Schedule 6 Part I).

77. And sewerage undertakers have these powers:

- Adoption of all or part of sewers, lateral drains and sewage disposal works in its area (save those completed before 1 October 1937, that is, before the Public Health Act 1936) (section 102).

- To alter the drainage system of its area in the event that drainage from any premises is not adapted to the general system or is otherwise objectionable, by the provision of new drains/sewers and the closure/filling up of the existing drain, sewer or cesspool (section 113); and
- To close or restrict the use of public sewers (section 116).

78. Water and sewerage undertakers may not dispose of any operational land without the consent of the Secretary of State (sections 156 and 219).

Other Sources of Information

79. The companies provide some information on a voluntary basis.

80. The companies must also provide some information through other legislation, for example to comply with their data protection requirements and corporate reporting requirements. Those companies that are publicly listed make Stock Exchange announcements in the normal manner. Those companies that are not publicly listed public limited companies must under Licence Condition F publish accounting information about their interim and final results as if they were listed. As with other holders of licences to extract and discharge water to/from watercourses, the companies provide information to the EA if the EA requires them so to do.

81. The companies must, as sewerage undertakers, keep a public register with details of trade effluent discharge consents and agreements.

82. OFWAT must keep a register of all appointments as undertakers and conditions attached thereto.

83. The Secretary of State may publish such information as he chooses about the operations of water undertakers. OFWAT has powers to publish such information to customers.

84. It is, in general, a criminal offence, punishable by 2 years imprisonment, to disclose information obtained under WIA about the operations of particular undertakers if they do not consent (section 206).

85. The EA must also maintain a public register of details of applications and consents for abstraction and impounding licences.

86. Public registers must be kept by the EA of all applications for discharge permits, grants of permit, and conditions attached thereto (regulation 46 of, and Schedule 24 to, the Environmental Permitting (England and Wales) Regulations 2010 (SI No 675)), and water quality objectives. Details of samples, and analysis thereof, taken by the EA of discharges and receiving waters must be included, as must any such information actually supplied by the companies to the EA. Information about samples must be placed on the register within two months. Information may not be included without the consent of the companies if it is considered commercially confidential.

87. FOIA requires much information actually held by public bodies, such as the EA, OFWAT and the Secretary of State, to be made available on request. It does

not purport to transpose EID. It is in some respects narrower in scope. It does not, for example, exclude from exemption information about emissions (as EID and EIR do). Information may be refused on grounds of commercial confidentiality. There is no right to information which has been supplied on a voluntary basis to the public body.

88. The Kiev Protocol to Aarhus requires the establishment of a pollution release and transfer register (maintained by the EA), accessible to the public, containing information on the release to air, water or land of 86 substances by eight industry sectors (including wastewater treatment).

The Water Act 2014

89. This Act makes additional detailed provision for the water industry, but we were not concerned with its provisions.

C. The definition of public authority

90. Aarhus is based on three pillars: access to information, public participation in decision-making, and access to justice. It applies to public authorities as defined in Article 2(2):

> 'Public authority' means:
>
> (a) Government at national, regional and other level;
>
> (b) Natural or legal persons performing public administrative functions under national law, including specific duties, activities or services in relation to the environment;
>
> (c) Any other natural or legal persons having public responsibilities or functions, or providing public services, in relation to the environment, under the control of a body or person falling within subparagraphs (a) or (b) above;
>
> (d) The institutions of any regional economic integration organization referred to in article 17 which is a Party to this Convention.

91. This definition was transposed into Article 2(2) of EID:

> 'Public authority' shall mean:
>
> (a) government or other public administration, including public advisory bodies, at national, regional or local level;
>
> (b) any natural or legal person performing public administrative functions under national law, including specific duties, activities or services in relation to the environment; and
>
> (c) any natural or legal person having public responsibilities or functions, or providing public services, relating to the environment under the control of a body or person falling within (a) or (b).

92. The definition of 'public authority' in regulation 2(2) of EIR is differently arranged:

> Subject to paragraph (3), 'public authority' means—
>
> (a) government departments;
>
> (b) any other public authority as defined in section 3(1) of the Act, disregarding for this purpose the exceptions in paragraph 6 of Schedule 1 to the Act, but excluding—
>
> (i) any body or office-holder listed in Schedule 1 to the Act only in relation to information of a specified description; or
>
> (ii) any person designated by Order under section 5 of the Act;
>
> (c) any other body or other person, that carries out functions of public administration; or
>
> (d) any other body or other person, that is under the control of a person falling within sub-paragraphs (a), (b) or (c) and—
>
> (i) has public responsibilities relating to the environment;
>
> (ii) exercises functions of a public nature relating to the environment; or
>
> (iii) provides public services relating to the environment.

This differs from the definitions in Aarhus and EID in one respect, and perhaps in two.

93. It certainly differs in adopting different numbering, so that Article 2(2)(b) in Aarhus and EID are the equivalent of regulation 2(2)(c), while Article 2(2)(c) of Aarhus and EID are the equivalent of regulation 2(2)(d).

94. Mr McCracken argued that there was another difference. In regulation 2(2)(d), *control* qualifies *body*, whereas in Aarhus and EID it is at least ambiguous and could be read as qualifying *services* rather than *body*. The answer for us lies in the second paragraph of the CJEU's order, which states that the body is a public authority if, to paraphrase, it does not provide its services in a genuinely autonomous manner.

D. The proper role of the Upper Tribunal

95. Ms Proops invited us to set out the principles on which the classification of a body could be made. We understand and sympathise with the Commissioner's desire to obtain such guidance. The CJEU has laid down tests that are general in their terms and uncertain in their application to particular cases. The Commissioner has to train his staff, publish guidance on his website, and decide what arguments to present on appeals; most importantly of all, he wants to get his decisions right.

96. The Upper Tribunal's duty is to decide the cases that come before it. But it is not limited to that. It has a proper role in ensuring, or at least contributing to,

the coherent development of the law within its jurisdiction. This Chamber has, like the Social Security Commissioners before it and on whose practices the Upper Tribunal was based, given guidance for the benefit of decision-makers and the First-tier Tribunal. That guidance is also, we trust, helpful to parties and their advisers. The Immigration and Asylum Chamber takes a similar approach, notably in its Country Guidance cases, discussed in *Januzi v Secretary of State for the Home Department* [2006] 2 AC 426.

97. We have, therefore, tried to be as helpful to the Commissioner and the First-tier Tribunal as we can through our reasons on the public authority issue. We cannot, however, lay down broad, general principles in quite the way that Ms Proops requested for these reasons. First, because the nature of the issue does not permit that. Second, because we have to act in the context of a case. We should not write a treatise on a particular issue, however interesting and useful that might be. Third, because useful guidance must be based either on a wide range of experience, such as the judges of this Chamber have in social security matters, or on detailed evidence covering the scope of the guidance, such as the Immigration and Asylum Chamber receives in its Country Guidance cases. We do not yet have the accumulated experience of other bodies than the companies and we did not have evidence on other types of body.

98. Mr de la Mare invited us to indicate with precision which of the companies' powers we considered were special powers and which were not. He told us that the potential consequences of being classified as a public authority under EIR were such that the companies would need to consider whether to seek legislative change in order to divest themselves of the powers that had produced that effect. He provided us with a detailed, classified list of powers for our convenience. We decline to sit an examination set by a party, especially one that is headed by the rubric requiring candidates to answer all questions. We have to decide the public authority issue and to give our reasons for doing so. We have not found it necessary to deal with every power that was discussed in written submissions or during the hearing. Although we accept in principle that we should give such guidance as we can to decision-makers and the First-tier Tribunal, the position of other parties is different. It is not part of this Tribunal's function to assist them in seeking legislative reform of their governing legislation.

E. The application of the CJEU's tests

99. The CJEU recognises the division of function inherent in a reference under Article 267 of TFEU. It is the Court's role to answer the questions referred and the national court's role to apply the answers it receives to the case before it. There have, though, been cases in which the CJEU has applied the law to the case before it. *Stewart v Secretary of State for Work and Pensions* Case C-503/09 [2012] PTSR 1 is an example. It did not do so in this case. We heard a number of arguments that sought to draw conclusions from its failure to do so. Given the domestic legal material that was mentioned by the Court, so the arguments went, it is surely significant that it did, or did not, treat the case as so clear as not to require the national court to have to answer the questions.